PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADVERSE POSSESSION.

In an action to determine adverse claims to real property, a finding that a father executed a parol gift of an eighty acre tract to his son, living with him at the time, who went into possession thereof, and continued to hold the same adversely for more than fifteen years before the commencement of any action. The Supreme Court of Minnesota holds that the presumption arising from the relationship of the parties that the possession of the son was permissive, and continued for the benefit of the father, was rebutted by proof of the parol gift, and that the adverse possession was based thereon: *Malone* v. *Malone,* 93 N. W. 605. See *Collins* v. *Colleram* (Minn.), 90 N. W. 364.

Parol Gift

ANIMALS.

In *McChesney* v. *Wilson,* 93 N. W. 627, the Supreme Court of Michigan holds that where a man killed another's dog, which had killed his chickens, and continually committed nuisances about his premises, the question whether he was justified in so doing was for the jury, and that it was error for the court to direct a verdict for the plaintiff. The case presents a brief review of the authorities bearing upon the question of the right to kill an annoying dog, but does not make clear upon what considerations the jury should act in reaching its verdict. See in this connection *Hubbard* v. *Preston* (Mich.), 51 N. W. 209, and note to the case in 15 L. R. A. 249.

Right to Kill

ASSAULT WITH INTENT TO KILL.

In *Cosby* v. *Commonwealth,* 72 S. W. 1089, the Court of Appeals of Kentucky holds that only where the jury in a prosecution for an assault with a deadly weapon with intent to kill, believe that the instrument with which the defendant wounded another was such an in-

Deadly Weapon

ASSAULT WITH INTENT TO KILL (Continued).

strument as was reasonably calculated to produce death when used by a person of defendant's strength and in the manner in which it was used by him, would they be authorized to find that such instrument was a deadly weapon within the meaning of the law.

BANKS.

Against the dissent of three judges the Court of Appeals of New York holds in *Taylor* v. *Commercial Bank,* 66 N. E. 726, that in the absence of evidence of authorization, the cashier of a bank has no authority by virtue of his position to make any representations on behalf of the bank as to the solvency of a customer who is one of its debtors, and the bank is not estopped by such representations made by him to one whom the debtor of the bank referred to the bank for information. Compare *Barwick* v. *English Joint Stock Bank,* L. R. 2 Exch. 259, cited by the dissenting judges.

Authority of Cashier

In *Bryan* v. *First Nat. Bank of McKeesport,* 54 Atl. 480, the Supreme Court of Pennsylvania holds that where a bank receives from a depositor checks of another depositor, and gives credit for the same, it cannot, on failure of the drawer of the check to pay the same, charge off the credit, and on suit therefor allege as a defence that the checks had been given in a gambling transaction. Nor could it object to an offer in evidence of the checks, though they were unstamped, it having accepted them in that condition and placed them to the credit of the depositor. "The checks were not offered in evidence as the basis of his claim, or as instruments upon which he had sued." Compare *Chartiers & Robinson Turnpike Co.* v. *McNamara,* 72 Pa. 278.

Check of Another Depositor

BRIBERY.

A prisoner held under an illegal arrest cannot be convicted of offering to bribe an officer to allow him to escape: Court of Criminal Appeals of Texas in *Ex parte Richards,* 72 S. W. 838. Compare *Moore* v. *State,* 69 S. W. 521.

Illegal Arrest

CARRIERS.

Failure of a railroad company to furnish every passenger with a seat, and allowing a passenger to board a car when there is no seat for him is *not* negligence *per se:* Court of Civil Appeals of Texas in *Houston & T. C. R. Co.* v. *Bryant,* 72 S. W. 885.

Negligence per Se

DEATH BY WRONGFUL ACT.

In *Galveston, H. & S. A. Ry. Co.* v. *Contreras,* 72 S. W. 1051, the Court of Civil Appeals of Texas holds that in an action by a posthumous child for damages sustained by reason of his father's death, caused by the defendant's negligence, the fact that the mother and other children have recovered damages for such death is immaterial; but in such action the defendant could show the existence of the mother and five other children who were entitled to damages for the death of the father, as bearing on the *extent* of the present recovery.

Action by Posthumous Child

DYING DECLARATIONS.

Statements in a dying declaration that deceased had never made any threats against the defendant in his life; that deceased had not touched a drop of liquor for over a month; that he knew no reason why the defendant shot him, except the one he stated; that he did not think the defendant was going to shoot him, because he had never given him any cause to shoot him, and that he had never had a quarrel with the defendant, are all held to be inadmissible as referring to matters anterior to the killing, and not a part of the *res gestæ:* Supreme Court of Missouri (Division No. 2) in *State* v. *Parker,* 72 S. W. 650. See *State* v. *Draper,* 65 Mo. 340.

Admissibility

FOREIGN CORPORATIONS.

A foreign corporation may sue on a note given for the price of machinery sold by it, where the transaction was one of interstate commerce, without having had a permit to do business in the state: Court of Civic Appeals of Texas in *Lane, etc. Co.* v. *City Electric, etc. Co.,* 72 S.W. 425.

Right to Sue

INJUNCTION.

Telephone Wires

The Court of Appeals of Kentucky holds in *Cumberland Telephone & Telegraph Co.* v. *Louisville Home Telephone Co.*, 72 S. W. 4, that where a telephone company had been granted a permit to erect its poles on the same side of a street with the poles of another company, having a prior, but not exclusive, franchise, and the old company, whenever the new one started to put in poles of a certain height, immediately changed its own poles, and made them of such a height as to prevent the new company from proceeding, an injunction was issuable. It is said that the two telephone systems could not be operated on the same horizontal plane.

INSURANCE.

Transfer of Title

A policy of insurance provided that it should be void if any change other than the death of the insured should take place in the title of the subject of the insurance. A judgment had been rendered against the insured, and thereafter, without the insurance company's consent, he executed a deed of the property insured, in which his wife joined, to their son, intending thereby to prevent the enforcement of the judgment against the same. The deed was recorded, but no consideration was paid by the son, and there was no change of possession. Upon these facts the New York Supreme Court (Appellate Division, Fourth Department) holds in *Rosenstein* v. *Traders' Insurance Co. of Chicago*, 79 N. Y. Supp. 736, that the deed constituted a "change of title" within the policy rendering it unenforceable. Two judges dissent. Compare *Forward* v. *Insurance Co.*, 142 N. Y. 382.

Installments

A life policy called for the payment of the insurance in ten annual installments commencing with the death of the insured. The company refused to pay the first installment when due. The Supreme Court of Texas holds that, though an action on the policy put the company's liability on the contract in issue, judgment could not be rendered against it for the whole amount, with execution to issue for the various installments as they fell due: *New York Life Ins. Co.* v. *English*, 72 S.W. 58.

INTERSTATE COMMERCE.

The question of the original package with reference to cigarettes arises again in *Cook* v. *Marshall Co.*, 93 N. W. 372, where the Supreme Court of Iowa holds that where many boxes of cigarettes, each containing ten cigarettes, are given absolutely loose to an express company, by the manufacturer, to transport to a person in another state, each box will *not* be held to be an "original package," though it does not appear that the express company used any receptacle in which to carry them. The case is rested upon the recent decision of the United States Supreme Court, *Austin* v. *Tennessee,* 179 U. S. 343. The present case presents a slight but important advance over that case since there it affirmatively appeared that the express company used a basket for the packages of cigarettes, while in this case it did not appear that any receptacle whatever had been used for the small boxes. The principle is adopted from the case referred to that to entitle to protection under the interstate commerce clause, the size of the package must be such as is generally used in bona fide transactions of the same kind.

Original Package

JOINT TORT FEASORS.

Where one having a cause of action against several joint *tort feasors* settles with some of them, and discharges them from liability, the others are released, though the settlement provides that such others were not discharged: Supreme Court of Michigan in *McBride* v. *Scott,* 93 N. W. 243. See, however, *Ellis* v. *Esson,* 50 Wis. 138. The court arguing for the rule stated above says, "To hold that a reservation such as is here attempted saves the right as to other tort feasors, would open the door for the plaintiff in any case to acquire by successive settlements more than just compensation; or as is said by *Brown* v. *Kencheloe, supra.* [3 Cold. 193], 'the plaintiff in many instances would operate upon the fears of the defendants, and get from each full damages for the trespass committed.' "

Settlement with Part

JUDGES.

No action for damages can be maintained against a judge of a court of record for oppressively, maliciously and corruptly entertaining a decree of disbarment against an attorney, *Webb* v. *Fisher* (Supreme Court of

Judicial Acts

JUDGES (Continued).

Tennessee), 72 S. W. 110. See *Scott* v. *Stansfield,* 3 L. R. Exch. 220.

LIBEL.

In an action for libel it is competent to prove, as against a newspaper corporation, the ill-will or malice of the reporter who wrote the article, for the purpose of recovering punitive damages: New York Supreme Court (Appellate Division, First Department) in *Clifford* v. *Press Pub. Co.,* 79 N. Y. Supp. 767. One judge dissents. See *Krug* v. *Pitass,* 162 N. Y. 154.

Newspapers, Malice

NOTES.

In *Mutual Benefit Life Ins. Co.* v. *Daniels,* 93 N. W. 134, the Supreme Court of Nebraska holds that where a note provides for 10 per cent interest after maturity, and an extension agreement is entered into between the maker and holder, extending the time of payment, and providing for 6 per cent interest thereon during the period of extension, the note will again draw interest at 10 per cent. "The extension agreement," it is said, "had for its sole purpose the postponement of the date of maturity of the original contract." See also *North* v. *Walker's Adm'r,* 66 Mo. 453.

Interest, Extension

In Nebraska it is provided by statute that no one shall practice medicine without a license. A note was given for medical services rendered by an unlicensed practitioner. The Supreme Court of Nebraska holds in *Citizens' State Bank of Newman Grove* v. *Nore,* 93 N. W. 160, that such note might be recovered on in the hands of a bona fide purchaser, notwithstanding the statutory prohibition. The court lays down the general principle that a statute, though rendering an act criminal, will not in Nebraska be construed so as to make a negotiable instrument void in the hands of a bona fide purchaser unless the act specifically so declares. See and compare *Snoddy* v. *Bank,* 88 Tenn. 573.

Illegal Consideration

PARTY WALL.

The Supreme Court of Nebraska holds in *Cook* v. *Paul,* 93 N. W. 430, that a promise by an adjoining lot owner to the builder of a party wall to compensate him for the use thereof is personal to the promisee and not a

Covenant

PARTY WALL (Continued).

covenant running with the land; and where the builder's lot is conveyed to one party, and the party wall agreement assigned to another, the latter is entitled to the sum due under such agreement. See *Cole* v. *Hughes,* 54 N. Y. 444, and cases there cited, and also *Maine* v. *Crunston,* 98 Mass. 317.

PROPERTY.

Collecting Information

In *F. W. Dodge Co.* v. *Construction Information Co.,* 66 N. E. 204, the Supreme Judicial Court of Massachusetts holds that where a company is engaged in compiling information as to pubilc improvements as soon after they are contemplated as possible, and distributing such information to its customers, under an agreement that they will use the reports in strict confidence, and for their business only, to enable them to take steps to obtain contracts, such company has a property right in the information so compiled, which the courts will protect against one who surreptitiously obtains such information from a customer of the company and disseminates it to others.

RAILROADS.

Frightening Horses

A railorad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road: Supreme Court of Nebraska in *Hendricks* v. *Fremont, E. & M. V. R. Co.,* 93 N. W. 141. See *Railroad Co.* v. *Roberts* (Neb.), 91 N. W. 707.

RECEIVERS.

Costs of Receivership

The U. S. Circuit Court of Appeals (Ninth Circuit) holds in *Chapman* v. *Atlantic Trust Co.,* 119 Fed. 257, that where the costs and expenses of the management of mortgaged property by a receiver, authorized by the court, exceed the proceeds of the property when sold, together with its earnings, and the court has expressly retained jurisdiction over the subject-matter and the parties until the final settlement of the receiver's accounts, it has power on such settlement to render judgment for the deficiency against the complainant, at whose instance the receiver was appointed and continued and the expenses were incurred. See *Ephraim* v. *Bank,* 129 Cal. 589.

RECEIVERS (Continued).

Jurisdiction of Federal Courts

A federal court has jurisdiction to appoint a receiver for a corporation of another state, when by appearing and pleading to the merits, such corporation waives its exemption from being sued out of the district of its domicile, and its action in submitting to the jurisdiction of the court cannot be overruled at the instance of a stockholder or creditor, who was not a party in the original suit, but who has been permitted to intervene: U. S. Circuit Court (E. D., Louisiana) in *Lewis* v. *American Naval Stores Co.,* 119 Fed. 391. See *Trust Co.* v. *McGeorge,* 151 U. S. 129.

SALES.

Fraud of Purchaser, Election

If a contract for the sale of goods is procured by fraudulent representations of the purchaser as to his solvency, the vendor has an election to affirm or rescind the contract. He may sue for the price of the goods and also for damages for the fraud; these remedies being consistent, and proceeding on the theory of an affirmance of the contract. If, however, he elects to rescind the contract and recapture his goods, and obtains in equity a decree adjudicating that the contract is void on account of the fraud, he cannot thereafter bring an action against the vendee for damages for the fraud, such an action being founded on the procurement of the contract. The rescission of the contract on the ground of fraud is inconsistent with an action for deceit for being led into making the contract: Supreme Court of Georgia in *Bacon* v. *Moody,* 43 S. E. 482.

STATUTE OF FRAUDS.

Parol Gift

In *Shroyer* v. *Smith,* 54 Atl. 24, the Supreme Court of Pennsylvania holds that an instrument purporting to be a will, leaving land to one to whom the same land had been promised by parol in return for services, was a sufficient memorandum in writing within the statute of frauds, and created a title which would defeat a voluntary conveyance made by the testator after the contract had been entered into and before his death. See *Smith* v. *Tint,* 127 Pa. 341.

SUNDAY LAWS.

Constitutionality

The Supreme Court of Utah in *State* v. *Sopher,* 71 Pac. 482, presents a good review of the constitutional aspect of Sunday legislation. It is there held that an exception from the general operation of the law of hotels, boarding houses, baths, restaurants, taverns, livery stables, retail drug stores, and such manufacturing establishments as are usually kept in constant operation, is based upon a reasonable classification, and therefore permissible. The case also decides that the keeping open of a barber shop is not a "work of necessity" within the meaning of the statutes, which generally except works of charity and necessity. As to the constitutional aspect, see *Ex parte Burke,* 59 Cal. 6.

WAGERING CONTRACTS.

Recovery of Deposit, Assignment

The Court of Errors and Appeals of New Jersey, adopting the settled rule that money deposited in pursuance of a wagering agreement upon a rise or fall in the price of stocks may be recovered by the depositor from the depositary, whether the agreement had been executed or not, holds in *Van Pelt* v. *Schaulle,* 54 Atl. 437, that the depositor's right to such money is a chose in action arising on an implied contract, and is assignable at law.

WAYS.

Of Necessity, Selection

In *Thomas* v. *McCoy,* 66 N. E. 700, the Appellate Court of Indiana (Dvision No. 1), holds that before a person entitled to a way of necessity over the land of another can maintain an action to have it established, he must show that he has requested the owner of the land over which it is to pass to select a location for the way; that the owner has either failed to do so, or else has done it in an unreasonable manner; and that, in case the owner has failed to designate the route, the person seeking to have the way established has selected a location for it. Hence where the complaint in an action to have a way of necessity established, and the title thereto quieted, did not contain a particular description of the route selected, it was insufficient. See also *Ritchey* v. *Welsh,* 149 Ind. 214, 40 L. R. A. 105.